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No. 90-1463

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,
Petitioner,

v.

CITY OF NICEVILLE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR CABLEVISION SYSTEMS CORPORATION IN SUPPORT OF PETITIONER

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MOTION OF CABLEVISION SYSTEMS CORPORATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Cablevision Systems Corporation ("Cablevision") hereby moves, pursuant to Rule 37.2 of the Rules of the Court, for leave to file the attached brief as *amicus curiae* in support of the petition of Warner Cable Communications Inc. ("Warner Cable") for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Warner Cable has consented to the filing of the brief and its consent is being filed with the Clerk. Respondent has withheld its consent.

Cablevision is a cable television company operating cable television systems in 11 states, providing cable television services to approximately 1.5 million subscribers. Cablevision's subsidiary, Paragould Cablevision, Inc. ("Paragould Cablevision") of Paragould, Arkansas, is similarly situated to Warner Cable in that its challenge to the establishment of a rival cable television system by the City of Paragould ("the City") on First Amendment and antitrust grounds has been rejected by the Eighth Circuit. Taken together, the Eleventh and Eighth Circuit decisions have apparently been viewed by the City as a license to engage in any anticompetitive or oppressive activity calculated to eliminate Paragould Cablevision, as a First Amendment speaker, from the Paragould cable television market. Cablevision maintains that the freedom granted to cities by these decisions extends too far in that the decisions fail to provide adequate safeguards restricting the conduct of municipalities in cases such as these where First Amendment freedoms are clearly at stake.

The attached brief brings new and relevant information on this matter to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF CABLEVISION SYSTEMS CORPORATION IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Cablevision Systems Corporation ("Cablevision") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Warner Cable Communications Inc.

Cablevision operates cable television systems in 11 states, providing cable television service to over 1.5 million subscribers. Cablevision's affiliate, Rainbow, provides a wide variety of programming, including a regional news service, News 12 Long Island; three national services, American Movie Classics, Bravo, and SportsChannel America; and ten regional sports channels.

Paragould Cablevision, Inc. ("Paragould Cablevision"), an indirect subsidiary of Cablevision, is currently being challenged by a municipally-controlled cable

system in Paragould, Arkansas. Litigation brought by Paragould Cablevision raising claims under the First Amendment and federal antitrust laws is currently pending on petition for rehearing and suggestion for rehearing en banc in the United States Court of Appeals for the Eighth Circuit. *Paragould Cablevision v. City of Paragould*, 1991-1 Trade Cas. (CCH) ¶ 69,403 (8th Cir. Apr. 15, 1991), *petition for rehearing en banc* filed May 10, 1991. While not seeking to have its case reviewed by this Court at this moment, that case and Cablevision's experience add support to Warner Cable Communications Inc.'s ("Warner Cable") petition that this case raises important nationwide constitutional questions meriting this Court's review.

REASONS FOR GRANTING THE PETITION

1. The issues and the factual situation raised in the pending petition for a writ of certiorari are not unique to Niceville, Florida or to petitioner Warner Cable. They are relevant nationwide. Paragould Cablevision, for example, an indirect subsidiary of Cablevision, is currently being challenged by a municipally-controlled cable system in Paragould, Arkansas. The Paragould situation is more advanced than that in Niceville—the Paragould municipal system, City Cable, is operational. The actual tactics employed in Paragould parallel the announced plans of Niceville here in many respects, and the intent of the cities in both cases, to oust and destroy the private cable speaker, is clear. Whether viewed from the perspective of an economic market or from that of the marketplace of ideas, it is also clear that without the intervention and guidance of this Court, the political and economic motivations of the municipalities will inevitably lead them to trample upon, and brush aside, the First Amendment protections of private cable speakers and the rights of their own citizenry.

Paragould Cablevision has been providing cable service to subscribers in the City of Paragould, Arkansas since

1963. Its current Franchise Agreement with the City runs from December 10, 1983 to December 9, 1993 with provisions for two five-year extensions. Under its Franchise Agreement, Paragould Cablevision is required to pay the City a franchise fee equal to three percent of its gross receipts from the sale of cable television services, and to pay an annual rental charge to the municipally-owned light and water utility, Paragould Light and Water Commission ("CLW"), for the use of the Commission's utility poles. The system has over 6,000 subscribers.

In 1986, the voters of the City of Paragould approved an ordinance authorizing CLW to construct and operate a duplicative, municipally-owned cable television system. In June 1988, the City adopted an ordinance authorizing CLW to acquire, construct and operate a cable television system and entered into a franchise agreement with CLW. After being authorized through an election vote of 1,549 to 1,102, the City enacted a bond ordinance on January 22, 1990 authorizing the sale of general obligation bonds for the financing of the cable system; the bonds are secured by pledges of revenues derived from the system and, if necessary, by increased real estate taxes on all citizens in Paragould. In other words, the bonds are backed or secured by the taxing powers and real estate taxes of the City.

The municipal system began operations in March, 1991. In implementing these plans, the governmental officials in Paragould have revealed unmistakably that their aim is not to provide an alternative voice in Paragould, but to become the only cable speaker available to Paragould citizens. Moreover, they believe by their actions and statements that there are no constitutional or other limitations on the means they may employ to reach that objective:

—The publicly announced plans and financial projections of the municipal system are based upon assumptions that require CLW to capture the vast bulk of cable subscribers.

—Instead of the private and government-controlled cable speakers competing in the marketplace of ideas for acceptance, the government system is emphasizing that if too many citizens prefer the private cable speaker, higher property taxes will be required to subsidize the government speaker.

—Paragould Cablevision believes that the government cable speaker is being improperly cross-subsidized by CLW, the municipally-owned utility, and that the government is attempting to leverage its utility monopoly to drown out, through economic preclusion, Paragould Cablevision, the private speaker. To date, Paragould Cablevision has been denied a trial to establish this point.

—When Paragould Cablevision notified the City of its desire to exercise its First Amendment commercial speech rights by transmitting local advertising on its system, the City insisted on an elaborate negotiation process before it would allegedly "authorize" the commercial speech. Specifically, the City insisted that its authorization would be dependent upon Paragould Cablevision paying the City a percentage of its advertising revenues under the Franchise Agreement, despite the fact that the franchise fee is limited to revenues from the sale of cable television services and City Cable's Franchise Agreement has not been construed to restrict advertising, to require negotiations with the City to permit advertising or to pay franchise fees on advertising.[1] The revenues derived from local advertising would help Paragould Cablevision

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[1] In the pending federal litigation between Paragould Cablevision, the City and CLW, Paragould Cablevision has challenged this conduct as violative of the First Amendment. The Eighth Circuit held that while Paragould Cablevision's First Amendment claims were valid, Paragould Cablevision waived its free speech rights when it signed the initial franchise agreement. *Paragould Cablevision, supra.* Paragould Cablevision has challenged the ruling on rehearing. *Compare Brookhart v. Janis*, 384 U.S. 1 (1966); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

offset revenues lost when any subscribers switched to City Cable and thereby help it attempt to sustain itself as an independent, non-governmental speaker in Paragould. The City again provides its own system an unfair competitive advantage.

—In the pending litigation with Paragould Cablevision, the City of Paragould has expressed the position that its conduct is entirely exempt from scrutiny under both federal antitrust law and the First Amendment.[2]

The plans and conduct of the municipal officials in Paragould, Arkansas and Niceville, Florida so eerily resemble each other, it is as if a battleplan has been established as to how a local government can silence an unwanted private cable speaker. This pattern, as pointed out in Warner Cable's petition, is spreading across the nation. The number of threatened municipal overbuilds has increased from 10 to more than 80 in the past two years.[3] The United States Court of Appeals for the Eleventh Circuit has now given those battleplans its constitutional endorsement. Unless that decision is reviewed and set aside by this Court, an increasing number of private cable speakers will be silenced without even the benefit of trial, as has been the case here and vis-a-vis Paragould.

2. This Court has explicitly recognized that cable is entitled to First Amendment protection. *See, e.g., City of Los Angeles v. Preferred Communications*, 476 U.S. 488

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[2] *See* Brief of City of Paragould, Arkansas, et al. at 16, 18, *Paragould Cablevision v. City of Paragould* (8th Cir. Apr. 15, 1991) (No. 90-1820). The Eighth Circuit has confirmed that position with respect to the antitrust laws, a holding Paragould Cablevision is challenging on rehearing.

[3] Brief of Warner Cable Communications Inc., at 12 n.11, *Warner Cable Communications v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990) (No. 90-1463). The City of Paragould's municipal cable system has reported numerous inquiries from other cities. "Paragould CLW Gets Tough On Leaks," *Jonesboro (Ark.) Sun*, Mar. 21, 1991, at 14B. "City Cable Will Be Better Value, CLW Claims," *Paragould Daily Press*, Jan. 23, 1991.

(1986); *see also id.* at 496 (Blackmun, J., concurring). This Court has also emphasized that cable speakers exercise "a significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). As the Court recently recognized: "Cable television provides to its subscribers news, information and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.'" *Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991). In asessing the importance of the petition presented here, we urge the Court to consider carefully the chilling or censoring effect the Court of Appeals' ruling will inevitably have.

Again, Cablevision seeks to illustrate the point with its own activities. Cable speakers have been able to fill the void of local news and information coverage passed over by broadcast television in those markets with television outlets, and cable is the only video provider of such core First Amendment material in the many thousands of localities like Niceville, Florida, and Paragould, Arkansas that lack television stations. Cablevision, for example, has created innovative local news programming, including News 12 Long Island and News 12 Connecticut. These programs provide local news of interest to residents and contribute to a regional identity in each of the areas served.

For example, News 12 Long Island now serves over 600,000 subscribers and "has become a pervasive force . . . providing commentary and insight on Long Island's 108 diverse towns and villages.[4] News 12 Long Island "has provided Long Island viewers with local news coverage in a vacuum left virtually untouched by the network affiliates and local broadcasters covering the New York metropolitan area."[5] News 12 Long Island pro-

[4] "The Media Business; Growth of Local-News Station Is Watched by Cable Industry," *N.Y. Times*, Sept. 5, 1988, § 1 at 30.

[5] "News 12's Success Spawning Clones," *Multichannel News*, Feb. 19, 1990 at 4.

vides coverage of the governmental entities that license private cable speakers and that could launch government-owned cable speakers, and whose coverage of local government affairs would inevitably and undoubtedly be different. News 12 recently received two local Emmy awards in categories where it competed with all New York metropolitan television stations.

While a pioneer, Cablevision's award-winning local news innovations are not unique. Similar news channels are underway in Orange County, California and the Chicago area; others have been announced for the Boston and Washington, D.C. regions and in New York City.[6] A company has targeted this phenomenon to provide cable systems with supplementary national and global newsfeeds to augment the local news coverage.[7] Buoyed by the interest in and success of Gulf War coverage provided by the cable networks CNN and C-SPAN, the cable industry is launching wide-spread expansion of its local news cable channels in the 1990s.[8]

This entire development could be threatened or affected in perverse ways by the foreseeable effects of the Court of Appeals' decision, if unreviewed. Instead of the robust coverage by the press of local events that is at the core of the First Amendment,[9] private cable speakers

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[6] "Fires, School Board Meetings, and Accidents—24 Hours a Day," *Business Week*, Dec. 17, 1990, at 32.

[7] "All News Channel Pursuing Cable Deals," *Electronic Media*, Jan. 28, 1991, at 16.

[8] *Id.*; *see also Broadcasting*, Apr. 1, 1991, at 31.

[9] *See, e.g., Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve."); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

would inevitably be chilled by the knowledge that candid, perhaps critical, coverage might trigger the creation of government cable speakers which have been given a constitutional free pass to use tax subsidies, cross-subsidies from local utilities, pervasive regulatory powers over cable, discriminatory taxes and virtually any other means to silence the critical video printing press. The implications of the absence of review by this Court are enormously sobering.

3. Warner Cable's petition persuasively establishes a multitude of independent reasons why this Court should review the judgment below, establish guidelines, and explain the need for a remand for trial. Cablevision believes that the considerations outlined above further support the rationale for granting the petition.

In assessing whether the First Amendment analysis employed by the Court of Appeals is flawed, this Court should also be aware of federal governmental interests that, in our view, undercut the Eleventh Circuit's erroneous or facile conclusion that the First Amendment can never be abridged by the conduct challenged here. First, in contrast to the *carte blanche* accorded by the *Niceville* court, Congress has directed in the Cable Communications Policy Act of 1984 that cable systems are entitled to significant protections against the unfair and arbitrary renewal actions previously practiced by franchising authorities.[10] Local political officials can evade these safeguards by threatening to overbuild or by overbuilding.

Second, the Federal Communications Commission, charged with supervisory policy authority over cable television, has articulated a strong policy preference for the grant of more franchises for additional cable speakers, rather than monopoly speakers, whether private or gov-

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[10] *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 546 (1991). *See also* H.R. Rep. No. 934, 98th Cong., 2d Sess., at 72 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 4655, 4709.

ernmental.[11] Hence, whether the First Amendment issues are analyzed under *United States v. O'Brien*, 391 U.S. 367 (1968), as the Court of Appeals found, or under a stricter standard, as Warner Cable argues,[12] these governmental interests must be weighed carefully, after a full trial, a weighing the Court of Appeals erroneously refused to permit.

CONCLUSION

The petition for a writ of certiorari for the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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[11] *See* Report, *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5033-37 (July 31, 1990).

[12] Brief of Warner Cable Communications Inc., *supra* note 3, at 24.